

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25

GLOBE INDUSTRIES LLC

And

Cases 25-CA-209034
25-CA-209055
25-CA-209095
25-CA-209100

INDIANA STATE PIPE TRADES ASSOCIATION
AND U.A. LOCAL 502, AFL-CIO

GENERAL COUNSEL'S BRIEF
TO THE ADMINISTRATIVE LAW JUDGE

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I. STATEMENT OF THE FACTS

After the Indiana State Pipe Trades Association and UA Local 502 (the Union) successfully initiated a union organizing campaign with the assistance of employees Nathan Adams, Ralph Davis, and Dale Robbins at Globe Industries, LLC's (Respondent) facility through distributing handbills; talking to employees at the Respondent's facility on the shop floor, in the parking lot, and at a nearby gas station; and having overt union organizers apply for jobs, Globe Industries LLC (Respondent¹) responded by threatening its employees, on multiple occasions, with plant closure if they selected the Union as their collective-bargaining representative; interrogating job applicants about their union membership, activities, and sympathies; and informing job applicants that it does not hire union applicants in violation of Section 8(a)(1) of the Act. Finally, Respondent discharged Adams, Davis, and Robbins in front of their co-workers due to their involvement in and support of an organizing campaign by the Union in violation of Section 8(a)(1) and (3) of the Act.

A. The Union discovers Respondent's facility

On June 13, 2017, David Posey, the United Association International Representative, informed John Kurek, the lead organizer for the Indiana State Pipe Trades Association, that Globe Mechanical² started a non-union fabrication facility called Globe Industries in Pekin, Indiana. (TR48) Respondent is a limited liability company with an office and place of business in Pekin, IN. It is engaged in the manufacturing of industrial pipe fabrication in the petroleum and chemical industry. (TR105) (GC1q) Respondent cuts, fits, assembles, welds and paints carbon steel/petrochemical pipes. (TR298)

¹ There was testimony that Globe Industries LLC consists of the fabrication shop, hydro shop, and receiving. (TR 337)

² Globe Mechanical is a unionized facility in New Albany, IN. (TR 48)

On June 14, Kurek drove to the facility located off State Road 60 and S. Volyes Road. The property consisted of a receiving facility, fabrication shop, x-ray vault, maintenance facility, paint facility, hydro facility, the main office, and the employee parking lots. The receiving facility borders State Road 60 (TR50) on the west side on S. Volyes Road. The fabrication shop is another building on the west side of S. Volyes Road. It is about half the size of a football field. The welders and fitters worked in this facility. (GC13) (RX1) (TR51) The fabrication process occurs here. (TR324 – 330) Next to the fabrication shop is the x-ray booth. In front of the x-ray booth is the maintenance facility. Then another steel building, the paint shop, is located on the other side of the maintenance facility. (TR50) There is also a hydro facility that is separate from the buildings on the west side. (Rx 1) Across the street from the paint and fabrication shops, the main office is located on the east side of S. Volyes Road. (TR336) To the southwest of the main office, there is also a gravel employee parking lot with a crosswalk that extends towards the fabrication shop. (TR50) (Rx 1) Northeast of the main office is an area where a third-party vendor stores its products that are sold to Respondent and other entities. (TR336).

B. The commencement of the union campaign and employees' support of and engagement in protected union activity

After observing the Pekin, IN facility, the Union decided to start a union organizing campaign at Respondent's facility. On about June 29, John Kurek, the lead union organizer, and Brian Moreno, another union organizer, initiated their effort to organize the fitters and welders by distributing handbills to employees during their lunch time and after work (TR52, 58). Michael McCawley, an employee in checkout, received the flyer, saw other employees with the flyer, and saw the flyer inside the facility. (TR 448) After work, Kurek talked to Benjamin

Hunley³, the shop foreman for the fabrication shop, in the gravel parking lot while employees were present. (TR58) During that same time period while employees were still present, Kurek also saw Houston Andres⁴, the director of operations for Respondent, in that same gravel parking lot. (TR59) The Union spoke to about 12 to 20 employees on the initial day they distributed flyers. (TR 57, 58) On the evening of June 29, Kurek and the other organizer met with Ralph Davis, an employee of Respondent who worked as a fitter in the fabrication shop, and discussed organizing the Pekin, IN facility similar to the Globe Mechanical facility in New Albany, IN.

Andres testified that in June 2017 he learned about the Union. Specifically, around break time, he saw two gentlemen, who he later discovered were John Kurek and Brian Moreno. Kurek was placing flyers on the windshields of cars and Moreno was standing in front of the fabrication shop handing flyers to employees as they left for break. Andres walked outside to the employee parking lot and introduced himself as the director of operations of the facility. (TR345-346) Andres talked to Kurek and Moreno and told them they were more than welcome to stay as long as they wanted. (TR347) Andres told them they could come back again. (TR351) Andres returned to work at the end of break. (TR348) Andres stated he saw the flyer the union distributed. He said it was on yellow paper. (TR348)(GC 14 first page)

C. Respondent, by Benjamin Hunley, threatened Employees, including Ralph Davis, with plant closure if they selected the Union

On about June 30, Davis saw Kurek and another union organizer at Respondent's facility distributing flyers. Davis saw flyers on employees' cars. As employees were returning from break, Davis saw the union organizers talking to employees and he saw employees taking the flyers into the fabrication shop. (TR283, 284)(GC14 page one) Davis had his flyer with him

³ Benjamin Hunley is an admitted 2(11) supervisor and 2(13) agent under the Act.

⁴ Houston Andres is an admitted 2(11) supervisor and 2(13) agent under the Act. When Andres is used, it is referring to Houston Andres.

when he entered the fabrication shop. All the employees were discussing it. It was the “buzz”. (TR284) Davis was talking to an employee in their work area which was in front of the fabrication shop. They were standing in an open area to the left of their fit table. This was immediately after employees had returned from break and they had the flyers in their hands talking about it. (TR303-304) Davis was talking about the \$12 difference in wages he made compared to what the Union guys made and their benefits package. (TR307) Hunley approached a group of employees including Davis and stated that Respondent was built to be non-union and it would never be union. Hunley stated that Marlin Andres, Respondent’s owner, would close the place before he let it become union. (TR285)

Davis called Kurek and inquired more about the union. Davis talked to Kurek several times to find out what was needed to get the union. (TR286) At some point, Kurek provided Davis with his business cards and Union stickers. (TR286, TR300) Over the next several months, Davis talked to employees about the union. Davis referred employees to Kurek for answers to their questions. (TR287) Davis talked to employees daily from June 30 until October. On the second day of distributing flyers, the Union spoke to the same employees which consisted of about 15 to 20 employees. (TR57, 58)

Andres stated that on the next day the same union organizers returned in the same vehicles. (TR351, 460) Andres did not speak to them. (TR352) However, he saw them passing out the same yellow flyers again. Andres testified that he saw the union organizers talking to employees as they were coming and going from break. (TR460) All employees, including fitters and welders, take that break. (TR462) Andres testified that the Union also passed out a blue pamphlet. (Rx 12) Andres said the pamphlets were under the windshields and that’s where he

found his. (TR352) On June 29 or 30, Andres said Hunley gave him one of the union flyers. (TR353)(Rx 11).

On July 11, Kurek received a call from Nathan Adams. Adams informed him that he had previously worked for Globe Industries and that he had gotten Kurek's number from Ralph Davis. Kurek informed Adams that the Union was engaged in an organizing campaign at Respondent's facility and asked if he would seek employment with Respondent to help with the organizing campaign. Adams agreed. (TR60)

On July 13, Kurek and two organizers returned to Respondent's facility and distributed handbills during lunch to the same 15 to 20 employees. (GC 14 pages 1 and 2) Kurek saw employees take the fliers into the facility. At some point during the time the organizers were distributing the handbills to employees, Hunley and Andres entered the parking lot to talk to Kurek. (TR64, TR136) Andres testified that Kurek handed him one of the flyers (TR136-137)(GC14 first page only). Kurek testified that he handed Andres a brochure. (TR603) (Rx 12) Hunley mentioned to Kurek that he had been a member of the Union before and that the Union was wasting its time there. (TR65) Kurek told Andres that he would like to see a similar relationship with the Pekin shop that they had with the New Albany shop. Andres replied "Well, that would be Marlin's call" and that he thought they were going to keep the Pekin shop non-union. (TR65)

Later that day, the union organizers went to the gas station which was near Respondent's facility. They saw about five employees there. Ralph Davis was one the employees and they spoke to him for a while. (TR66) Dustin Partridge, a fitter assistant for Respondent who works in the fabrication shop, told Andres that he saw the union organizers at the gas station reminding people about lunch. Andres stated he didn't recall where they had the conversation or what time

of the day they had the conversation. Andres testified that some employees do go to that gas station on break. (TR462) Davis also stated that employees typically go to the Sunoco Gas Station that is a minute away from Respondent's facility for break.

- D. Respondent, by Benjamin Hunley, continued to threatened employees, including Nathan Adams, with plant closure if they selected the Union

In July 2017, Hunley saw the Union organizers at the facility handbilling again. (TR595-596) Once Nathan Adams was rehired in July as a welder for Respondent in the fabrication shop, he also started talking to employees about the Union. He communicated with employees about the Union on a daily basis, multiple times a day, at his booth in the fabrication shop, and/or on break. (TR176) Adams never initiated a conversation with supervisors; however, during a conversation with employees near the fit-up table near the front of the warehouse, Hunley, Adams' immediate supervisor, joined a conversation Adams was having with other employees. (TR 178-179) Adams was telling employees about the union scale wages and how they could be making more because Respondent's other shop in New Albany paid \$33 an hour plus had great insurance and benefits. Adams said it would be nice to make that kind of money and have good insurance. (TR200-201) Then Hunley walked up and stated that he had been in the Union and "money is not everything". Hunley said that if employees tried to get the Union in that Marlin Andres would shut the shop down. (TR178, TR202) Adams stated that Hunley made his statement regarding the Union directly to him. (TR203) After this conversation, Adams continued to talk to employees about the benefits of the Union.

In August and September, the Union continued its campaign by maintaining contact with Nathan Adams and Ralph Davis. (TR63) Kurek also spoke to Respondent's employees via phone and Union organizers made house calls on Respondent's employees. (TR66). In September, the Union had two organizers apply for jobs at Respondent's facility (TR67).

E. Respondent, by Sherry Cress, informed job applicants it did not hire union applicants

On September 19, 2017, Samuel Rouse and Paul Williamson, union organizers, went to Respondent's Pekin, IN facility to apply for jobs. Rouse said he had on a black union T-shirt that said "Local 502". Before entering the office, Rouse turned on a tape recorder. Upon entering the office, Cress greeted the gentlemen and asked if she could help them. Rouse and Williamson introduced themselves and asked for an application to take with them. Cress provided them job applications. Samuel Rouse asked if the Respondent hired union people. Cress replied "No, we're nonunion here." When Cress was asked if they could fill out an application anyway, Cress replied "well, you can anyway, I guess. I don't know. I guess. But yeah, we're nonunion." Cress informed Rouse and Williamson that "our New Albany location, they're union down there". (GC19)

F. Respondent, by Andres, interrogated job applicant Dale Robbins about his union sentiments

On about September 29, Dale Robbins went to Respondent's facility and filled out a job application. (TR219) On October 2, he left a message at the New Albany Globe facility for Andres. Andres returned his call and scheduled a 1:00 pm interview. (TR222). During the interview, Houston Andres and Robbins talked about the job and Robbins' experience. Andres asked Robbins how he knew about Respondent. Robbins told him he had a friend at Respondent's Union facility that told him about it. (TR222) Robbins told him what wage he needed to make. They agreed on \$23 an hour. As the conversation went on, Houston Andres mentioned "Are you Union". Robbins replied that he was not. They continued to talk about the job and Andres told Robbins that he could start on October 9. (TR223)

On October 9, Robbins met Ralph Davis and discovered that they had done the same kind of work jobs. Robbins started going to break and lunch with Davis. Davis, on Robbins' first day of work, started talking to Robbins about the Union. (TR223, 224) During Robbins first week of work, he also met Nathan Adams and Adams also talked to Robbins about the Union. (TR224) They talked about the Union every day. (TR224)

On October 10, Davis called Kurek and told him that they thought they had enough support to win an election. Kurek asked why Davis thought they would win an election. Davis explained that employees had gotten their reviews and they didn't get the raises they were promised and the employees felt it was unfair. Kurek scheduled a meeting to discuss the next steps with Davis and Adams. (TR67, 288) Davis informed him that Dale Robbins was a friend, had recently been hired, and was on board to help with the organizing campaign. (TR68)

When hired, Robbins had two welding hoods at work, one with union stickers and one without union stickers. He wore the one without stickers because the lens was better. The hood with union stickers sat on the shelf. The stickers were old union stickers. (TR254) Robbins lunchbox also had old union stickers on it. (TR230) Robbins carried his lunchbox to work daily and placed it at the main entrance where employees entered to start work. (TR231)

In October, on an unknown date, at a work table, Robbins brought up the union in the presence of an employee and Hunley. Hunley said that if the Union came in the shop they'd shut the doors down. (TR248, 249) While Robbins openly talked about the union in front of Hunley, he did not want Houston to know about his interest in the union. (TR259)

On October 18, employees Adams, Davis, and Robbins met Union organizers Kurek and Rouse at a restaurant and discussed the next steps to get an election for a union at Respondent's facility. Shortly thereafter, Adams, Davis, and Robbins signed authorization cards (CP2) and

contact cards (CP1); gave them to Kurek; and agreed to talk to their co-workers and to ask them to sign authorization cards and contact cards. (TR68) Kurek gave them authorization cards, contact cards, and union stickers, and they were asked to distribute them and get signatures. (TR 181, 224, 244, 289-290, 300) (CP1, CP2) Davis did not use any of the stickers but Robbins placed a new sticker on his lunchbox. Robbins' lunchbox now had stickers that read - "U.A." and "Pipe Fitters Local 502, Louisville, Kentucky". One sticker was three inches and the other sticker was six inches. (TR230)

After the meeting, Davis got an employee to sign an authorization card. (TR291) Robbins testified that he also distributed the cards and he received four back. (TR 228-9, 244) Adams said as employees passed by his booth he asked them to sign the cards. Adams stated that he tried to keep it quiet that he was actively recruiting for the Union. Adams did not wear any union paraphernalia. (TR198, 199)

G. Respondent terminated Nathan Adams because of his union activities

After October 18, Adams returned to work and similar to how he had discussed the Union with employees before, as employees passed by his work area, Adams asked them to sign the authorization cards. (TR176). On October 20, between 2:00 pm and 3:00 pm, Andres approached Adams booth. Andres told Adams that it wasn't working out and that he was going to have to let him go. (TR185, 421) Andres was terminated before any authorization cards were turned in to the Union. (TR193) Adams has no disciplinary actions regarding his work performance, except a couple of verbal warnings on visual inspections. (TR184, 188, 189)

H. Respondent terminated its employees Ralph Davis and Dale Robbins

On October 20 Andres also made the decision that Robbins and Davis would be administered a drug test. (TR149) Andres testified that on October 20, during 3:00 p.m. break, he

went to the Dollar General Store and saw Ralph Davis sitting in the passenger side of a Rodney Grainger's blue van. (TR149-150) When Andres walked by, he said he smelled marijuana.

(TR160) Andres testified that the window was up. (TR160) Other cars were parked next to the van. (TR161). Andres didn't recall what Davis was doing, didn't know where he was looking, didn't recall if he was wearing a hat or a bandana. He couldn't see what type of shirt Adams was wearing. However, Andres said he waved at Davis. He didn't know if Davis saw him. (TR160-161) Andres testified that he went into the store, purchased an item, left, and then decided at that moment Davis and Robbins would be required to take a drug test. Andres stated he only saw Davis at the Dollar General Store. (TR149-150)

Respondent, Charging Party, and Counsel for General Counsel entered into the following joint stipulation (Jt Ex 1):

1. Dollar General Corporation produced authentic video recordings for the Dollar General Store located in Pekin, IN.
2. Houston Andres, in the presence of the Counsel for Respondent, Charging Party, and General Counsel, viewed portions of the video recordings showing the front entrance door, the main cash register utilized, and both cash registers from 3:00 p.m. until 3:15 p.m.
3. Houston Andres identified that the video recordings were of the Dollar General Store located in Pekin, IN that he testified that he went to and purchased an item on October 20, 2017, during the 3:00 p.m. break.
4. Houston Andres was not in the video recordings at the Dollar General Store during the period of 3:00 p.m. until 3:15 p.m.

Notably, Davis left work early that day because he rode to work with Adams. Since Adams had been terminated, Davis left with Adams because he had ridden to work with him. (TR291) Davis wrote down what time he left on his time card. Davis did not go to the Dollar General Store on October 20. (TR291) As well, on October 20 Robbins left work about 2:30 pm to go to a doctor's appointment and did not return to work due to an illness until October 26. (TR272)

On October 26 when Robbins returned to work from sick leave, he continued to talk about the Union. An employee, Dustin approached Robbins and asked “did you pass your welding test at the Union”. Robbins replied “No, I’ve been off sick”. They were talking on the shop floor in the open. Robbins then asked that employee if he was in or out with the union, and the employee replied no. (TR272) Robbins stated that at some point one of the card signers told him that he wanted his card back because he didn’t want to lose his job. (TR229) The other three decided they did not want to be in the union so Robbins did not turn their cards in. (TR244-245)

On October 27 Andres asked Hunley and Michael McCawley, an employee in the fabrication shop, to come to his office. (TR449) McCawley stated on the way over to the Andres’ office he noticed an odor from Grainger’s van. McCawley asked Hunley what was the odor and Hunley informed him it was the smell of marijuana. McCawley thought he was about 50 feet away from the van. (TR441) They proceeded to walk to Houston Andres’ office. (TR441) Hunley testified that McCawley and he walked from the fabrication shop to Andres’ office prior to Andres talking to employees about taking a drug test. As they were walking, McCawley asked about a smell. Hunley said it was marijuana. Hunley said he did not know where it was coming from. There was no other discussion about it. (TR588)

Once in Andres’ office, they never discussed the odor they smelled on the way to the trailer. (TR449) Andres asked McCawley to serve as a witness. McCawley was never told why he was asked to serve as a witness. (TR450) Andres explained the process he would take with the employees and then grabbed a clip board with all of the refusal sheets and the stand-alone policy on drugs. (TR429) McCawley testified that the three of them walked to the shop. However, Andres testified that Hunley and McCawley walked back to the fabrication shop and he drove his truck over to the shop. (TR429)

In the fabrication shop, there were about 15 to 20 employees. (TR464) Hunley started handing drawings to fitters and Crawley waited at the door. Andres went around the fabrication shop to Robbins', Davis', and Grainger's work area, pointed them out, and instructed them to gather in the front near the main entrance. (TR 233-234, 294,430-431, 471) There in the open area, with McCawley present in the group, Andres held the Policy on Drugs up in his hand; told them they had signed the policy for employment; and told them that the policy gave him the ability to drug test them (TR 472, 473). Andres said they suspected them of drug use. (TR 235, 294) More specifically, he said "This is our policy on drugs that you gentlemen signed it in order to gain access to employment at the company. In this policy it gives me, the Employer, the ability to test for reasonable cause. I believe I have reasonable cause to test you guys. We're going to jump in the back of my truck and go take a piss test." (TR 235, 294, 430, 442)

Almost immediately in response to Andres telling them they had to take a drug test, Davis stated Robbins and he said Andres didn't have any suspicion and they didn't do drugs. (294) Davis stated he wasn't going anywhere with Andres, he was getting his helmet, and he was leaving. Davis stated he never said he wouldn't pass the drug test. (TR295)

Robbins stated he didn't do drugs, he would not take the test, and he would just go home. (TR238) Robbins said that Davis said the same thing. Robbins stated that he never said he smoked pot. He also stated he never said he wouldn't pass the drug test. (TR238-239) Andres said "I appreciate the honesty guys but I can't take your word for it. We're either going to have to go down to the center or you're going to have to sign these refusal forms that I've prepared, indicating that you're going to refuse the test." Andres said Davis signed the drug test refusal form. (TR 294, 433, 443-444)(R EX21) Robbins signed the drug test refusal form. (TR 433-434)(R EX19) McCawley and Andres signed the forms also. (TR433, 443-444). Andres

told the employees they were suspended effective immediately and that their employment with the company would be evaluated and that he would give them a call at a later time. (TR 237, 239, 295, 434-435, 443-444) Andres called them after lunch and left voicemails. Andres said he was prepared to terminate them on October 27 and he was the decision-maker. (TR473) Andres testified that Davis' and Robbins' refusal not to take the drug test was not a factor in his decision to terminate them. (TR473-474)

I. The Union informed Employees about Respondent's perceived unfair labor practices and assisted the Discriminates with membership in the Union and a job search

On about October 27, Davis and Robbins informed Kurek that the Respondent had terminated them. The Union decided to inform the employees that they believed the discharges of Adams, Davis, and Robbins were unfair labor practices by distributing flyers on November 16 and 20. (TR73) (GC18) Andres confirmed that Kurek and Rouse distributed two flyers in November 2017. (TR 353 and 358) For Davis, Adams, and Robbins, the Union sought membership in the union and began to search for union jobs for them. As a requirement, drug test were administer on October 26 to Adams, on October November 9 to Davis, and on November 9 to Robbins. On October 30, the test was verified that Adams passed; on November 13 the test were verified that Davis and Robbins passed. (GC 15, 16, 17) As part of the job duties for the privacy officer, on behalf of the Union, he maintains these records in the ordinary course of business. (TR 96) On November 20, when Kurek and Rouse returned to Respondent's facility, around 9:00 am, Houston Andres pulled his vehicle up next to Kurek's vehicle. Andres stated "Starting now, you guys are no longer welcome on Globe property. This is coming from the owner, Marlin." (TR76)

J. Respondent's Supervisors and Agents who committed violations of the Act

Houston Andres is the Director of Operations and has held the position since mid-February 2017 and is presently holding that position. (TR105) Andres reports directly to Marlin Andres, his father and the owner. (TR110) Andres' office is located on the east side of Voyles road in the trailer. (TR109). Houston Andres typically works from 8:00 am to 4:30 pm. (TR109) As director of operations, Houston Andres oversees the fabrication operations, paint operation, receiving, and hydrostatic testing. There are approximately 25 to 30 employees employed at Respondent facility. (TR323) There are 20 employees in fabrication shop, 9 in the paint facility, 3 in receiving, and 1 in hydro. (TR 106) Andres has at least two direct reports: Benjamin Hunley, the fabrication shop foreman, and Sherry Cress, the office manager. (TR110, 119)

II. ANALYSIS

A. Respondent thwarted employees protected union activities by engaging in multiple violations of Section 8(a)(1)

Section 8(a)(1) of the Act provides that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7" of the Act. Section 7 guarantees to employees the right to form, join, or assist labor organizations. A violation of Section 8(a)(1) does not depend on the employer's motivation or on the subjective reaction of the employees or on whether the coercion succeeded or failed. Rather, the Board's test is "whether the supervisor's conduct reasonably tended to interfere with the free exercise of the employee's rights under the Act." *Whirlpool Corp.*, 337 NLRB No. 117 (2002), citing *American Freightways Co.*, 124 NLRB 146, 147 (1959). In making this determination, all of the circumstances, including the context in which the alleged unlawful statement or action occurred, are considered. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)

1. Respondent threatened plant closure if employee's selected the Union

The Supreme Court in *Gissel* has held that the threat of plant closure by an employer that might result from unionization should be evaluated in "total context". The Board has found predictions not based on objective fact Board seldom to be coercive threats. In *Atlas Microfilming*, 267 NLRB 682 (1983), for example, the Board found a violation where a supervisor told all the employees in her department that the plant would close if the employees selected the union. See also *Highland Yarn Mills*, 313 NLRB 193, 206, 209 (1993). Likewise, in *Overnite Transportation Co.*, 296 NLRB 669, 670 (1989), the Board found that the employer's statement that it would close its door if employees voted for the union violated the Act regardless of whether the threat was disseminated in the workplace.

Respondent pretended that it was open to the Union by inviting the union organizers on its property; however it conveyed an immediate polar opposite message to employees by making several coercive statements by Respondents supervisors and/or agents. On about June 29, Respondent via Hunley, the shop foreman who works 95% of his time daily on the shop floor with the fitters and welders and an admitted supervisor under the Act, approached a group of employees shortly after they had received flyers from the Union. Led by Davis, the employees were actively engaged in discussing the Union's information. At some point when Hunley started talking to Davis and Hunley stated Respondent was built to be non-union and it would never be union. He also stated that Marlin Andres, Respondent's owner, would close the place before he let it become union. Around this time, Hunley had spoken with the union organizers, seen employees talking to organizers and accepting flyers, and had given a copy of the Union flyer to Andres.

Then on about July 13, when Kurek and two organizers were at Respondent's facility again, Andres and Hunley approached Kurek in the employee parking lot. Kurek handed Andres

a solicitation brochure and stated he would like to have a similar relationship with Respondent's Pekin facility as they had with its Albany, IN facility. During the conversation, Andres told Kurek that he had been a member of the Union but they were wasting their time there. Andres told Kurek that it would be Marlin Andres call but he thought the Pekin facility would stay non-union.

Then about late-August (a month prior to Adams discharge), Hunley again approached a group of employees. Nathan Adams was discussing the Union scale wages and stated that it would be nice to make that kind of money and have good benefits. Hunley replied "money is not everything" and that if employees tried to get the Union in that Marlin Andres would shut down.

Hunley found himself again in a conversation with employees regarding the union, shortly after Robbins was hired in October 2017. Robbins mentioned the union at a work table when Hunley was present. Similarly, Hunley replied that if a union came in the shop, they'd shut the doors down.⁵

In sum, the evidence supports a finding of a violation. Although Hunley denied making the 8(a)(1) threats, Hunley's denial is not credible in light of his own admission that he discussed the union with employees. This alone is not a violation. However, the evidence supports a finding that those conversations included the alleged coercive threats to employees. Notably, three different employees corroborate that Hunley, who had unhindered access to employees, made the same threats of plant closure to different groups of employees on the shop floor throughout the union campaign. Secondly, Kurek testified that Hunley told him that the Union was wasting its time at Respondent's facility at the same time that Andres informed Kurek that he thought Respondent's facility would stay non-union. These sentiments bolster the likelihood

⁵ The complaint was amended at trial to include in October 2017, Respondent, by Benjamin Hunley, at Respondent's facility, threatened employees with plant closure if the employees selected the Charging Party as their collective-bargaining representative.

that Hunley made these coercive threats. Based on the evidence, Your Honor should find that Respondent in June, late-August, and in October threatened plant closure if employees selected the Union in violation of Section 8(a)(1) of the Act.

2. Respondent informed job applicants it wouldn't hire them because of their Union affiliation

Before addressing the 8(a)(1) allegation underlying the unfair labor practice set forth in the complaint regarding Sherry Cress, a preliminary question of whether Cress, during the relevant period, as the office manager at the Pekin, IN facility, was an agent for the Respondent must be decided. The Board applies common law agency principles to determine whether an employee is an agent of an employer and thus whether that employee's actions are attributable to the employer. The employer is responsible if that employee acted with apparent authority of the employer with respect to the unlawful conduct. "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the later to believe that the principal has authorized the alleged agent to perform the acts in question." *In re D&F Industries Inc.*, 339 NLRB 618, 619 (2003); quoting *Cooper Industries*, 328 NLRB 145 (1999). In other terms, the Board considers whether under all the circumstances, the employee would reasonably believe that the alleged agent "was reflecting company policy and speaking and acting for management". *Id.* In determining the agency status, the alleged employee's job duties and responsibilities are relevant. *In re D&F Industries, Inc.*; quoting *Pan-Oston Co.*, 336 NLRB 305, 306 (2001); *Jules V. Lane*, 262 NLRB 118, 119 (1982). In addition, if the employee is "held out as a conduit for transmitting information [from the employer] to the other employees", the employee's statement may be attributed to the employer. Here the Board will consider whether the statements and conduct are consistent with those of the employer. Notably, Section

2(13) states that “whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.” *National Labor Relations Act, 29 U.S.C. §151 et seq.* Thus, a statement by an employee who is an agent, informing a job applicant that they would not be hired because of union membership can be attributable to the employer and would be a violation of the Act. *Exterior Systems, Inc*, 338 NLRB 677, 679 (2002)

- a. Cress job duties reflect that she has apparent authority to act on behalf of Respondent

Sherry inputs data into the payroll software system for to generate payroll. She obtains this information from Hunley who is responsible for getting the hours for the fabrication shop employees and from the paint foreman who is responsible for getting the hours for the painting shop employees. Similar to the foremen, Cress is responsible for getting the hours for David Leap, a maintenance employee. (TR492-493) Cress is listed as a person authorized to verify ACH file delivery with the bank. (TR126 and 551)(GC5) Although Cress does not have the authority to change procedures to the ACH file, she submits the dollar amount for employees to get paid into the ACH file on behalf of Respondent. This system is used for the direct deposits. (TR552, 562-563) Andres indicated that Cress does not have any authority to commit Respondent’s credit. Yet, he stated she purchases miscellaneous office items like paper and pens pursuant to instructions for Respondent. (TR342) Cress prepares packing slips or bills of lading. If Cress suspects information is not correct, she has the authority to verify information with a foreman to ensure it is accurate. (TR343)

- b. Cress job duties reflect she is a conduit for transmitting information to third parties on behalf of Respondent

The evidence is clear that Cress has apparent authority to speak on behalf of Respondent related to third-party entities. When greeting visitors, Cress does not provide them with her personal information. She asks if she can help them with the expectation of providing information related to Respondent. (TR564) Cress testified that she greets the public and when people come into the office she speaks on behalf of Respondent. (TR297) When Cress contacts insurance companies, the purpose is to set up new employees' insurance benefits. (TR 132) Cress has submitted insurance forms to Assured Partners, Respondent's insurance broker, on behalf of Respondent. (TR561-562) (GC22) In working directly with an employee, for instance, Ralph Davis dealt with Cress with his insurance and 401(K). (TR297)

The evidence established that on behalf of the Respondent Cress verified, reviewed, examined, certified, and conveyed confidential information to third party entities. Cress has also served as a contact person for state and federal agencies on behalf of Respondent. The parties stipulated that Cress verified the information for Respondent that was filed with the Indiana Secretary of State. (TR121)(GC2) Notably, Cress and Marlin Andres are the only individuals who were aware that Respondent had to file the document with the State on behalf of Respondent. (TR122)(GC2) Every two years, Cress reviews the information for the Indiana Secretary of State for its accuracy and pays the fee on behalf of Respondent. (TR563) Cress is also listed as Respondent's contact person for the Indiana New Hire Reporting Center. (TR123)(GC3) On an Unemployment Insurance Protest Form dated November 13, 2017, Sherry Cress is listed as the contact name for Respondent. (TR125)(GC4) Sherry Cress signed that she examined and certified information on an OSHA 300 Log. (TR 127)(GC 6) Sherry Cress signed and verified information for the first and second quarters of Respondent's Quarterly Federal Tax Form. Cress prepared and declared the accuracy of Respondents' first and second quarterly

reports. Cress inputs the hours and job costing in the payroll software system and generates the quarterly payroll reports. (TR344, 552-553) Respondent did not produce the third quarter report pursuant to the subpoena; thus, an inference should be drawn that Cress prepared and declared the accuracy of it as well. The fourth quarter was prepared by an accountant but Cress' name was listed as verified/swore to its accuracy on behalf of Respondent. (TR127-130)(GC7) Cress said for Unemployment Insurance Claims Forms, she transferred information from an employee termination sheet onto the protest form and sent it via email or fax.

With the employment application, Cress said she usually doesn't tell applicants anything. However, the record evidence demonstrates via a recorded transcript that Cress engaged in a conversation with job applicants. On September 19, Cress said greeted job applicants Rouse and Williamson. After they stated why they were there, Cress asked if they wanted to fill out the application in the office or take it with them. Rouse asked if Respondent hired union people. Cress replied "No, we're nonunion here". Andres stated Cress could address visitors' questions and give job applicants updates on their application. (TR131, 133)

Similar to previous supervisory sentiments like Hunley threat of plant closure if a union comes in and Andres stated that the facility would remain a non-union, Cress statement is consistent with Respondent's sentiments. In these circumstances, Your Honor should find that Cress was an agent of Respondent; therefore, Respondent by Cress, violated Section 8(a)(1) of the Act by informing job applicants they would not be hired because of their union membership.

3. Respondent interrogated a job applicant regarding his union sentiments

In analyzing whether an unlawful interrogation has occurred, the Board considers the totality of the circumstances to determine whether the alleged interrogation reasonably tends to restrain, coerce, or interfere with the employees in the exercise of rights guaranteed by the Act.

Rossmore House, 269 NLRB 1176 (1984), *affd. sub nom. Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The words or the context in which they are used must suggest an element of coercion or interference. *Id.* Factors to consider are the time and place of the interrogation, the method used, the personnel involved, the nature of the information sought, the known position of the employer, whether the employee was given assurances that there would be no reprisals, whether a valid purpose for the interrogation was communicated to the employee, the truthfulness of the employee's response, and whether the person being questioned is an open union adherent. *Performance Friction Corp.*, 335 NLRB 1117 (2001); citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964); *Rossmore House, supra*; *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Notably, the Board has long recognized that a job applicant "may understandably fear any answer he might give to questions about union sentiments posed in a job interview may well affect his job prospects." *Adco Electric*, 307 NLRB 1113, 1116-1117 (1992); *Standard Sheet Metal Inc.*, 326 NLRB 411, 420 (1998)

The interrogation by Andres, an admitted supervisor of Respondent under the Act, on October 2, 2017 was conducted in Respondent's office, in a one-on-one environment, during a job interview with Robbins. When Andres inquired how Robbins knew about Respondent, Robbins informed him that he had friend at the unionized facility in New Albany. During the interview, Andres then asked Robbins "Are you Union".

While Robbins may have listed union jobs on his application, Respondent gave no assurance that there would be no reprisal pertaining to this line of inquiry; nor was a valid purpose given for this line of questioning coming from a high-level manager. Notably, Andres was second-in-charge at the Pekin, IN facility. Only the owner, Marlin Andres had a higher rank. Andres sought to determine Robbins' union sympathies in light of Respondent's known

position that its Pekin, IN facility was and would remain non-union. Although Andres did not mentioned the Respondent's antiunion sentiment, the interrogation was inherently coercive given it occurred in the context of a job interview. Your Honor should therefore find that Respondent violated Section 8(a)(1) by interrogating a job applicant about his union sentiments.

B. Respondent terminated Adams, Davis, and Robbins to impede them from engaging in protected union activities

Under the test set forth in *Wright Line*, the General Counsel has the burden of proving by a preponderance of the evidence that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. To meet this burden, the General Counsel must generally establish four elements. First, the existence of protected activity protected according to the Act. Second, Respondent was aware that the employee had engaged in such activity. Third, the alleged discriminatee suffered an adverse employment action. Fourth, there is a motivational link, or nexus, between the employee's protected activity and the adverse employment action. *Wright Line*, 251 NLRB 1083 (1980); *American Gardens Management Co.*, 338 NLRB No. 76 (2002).

The employer's knowledge of protected activity may be established through circumstantial evidence. *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), *enfd. mem.* *Montgomery Ward & Co.* 97 F.3d 1448 (4th Cir. 1996); *Greco & Haines, Inc.*, 306 NLRB 634 (1992). Circumstantial evidence may be inferred based on the timing of the discriminatory action, the employer's general knowledge of union activities, animus, disparate treatment, and pretextual reasons for the given adverse employment action. *Montgomery Ward & Co.*, *supra*; *Shattuck Denn Minig Corp v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Knowledge may also be inferred based on the small plant doctrine. *La Gloria Oil and Gas Co.*, 337 NLRB No. 177

(2002). Only one of these factors is necessary but frequently two or more may be present.

North Atlantic Medical Services, 329 NLRB 85 (1999).

Similarly, alternative methods have been devised to prove antiunion motivation, or nexus, indirectly based on the totality of the circumstances. *Sahara Las Vegas Corp.*, 284 NLRB 337, 347 (1987); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Wright Line*, *supra*; *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). For instance, antiunion motivation may reasonably be inferred from disparate treatment of the alleged discriminatee and other employees, *Holiday Inn East*, 281 NLRB 573, 575 (1986); the timing of the employment action in relation to the protected activity, *Taylor & Gaskin, Inc.*, 277 NLRB 563 fn.2 (1985); inconsistent or shifting explanations by the employer for the employment action, *Master Security Services*, 270 NLRB 543, 552 (1984); and the employer's own response to the charges, *Southwest Merchandising Corp., v. NLRB*, 53 F.3d 1334 (D.C. Cir. 1995). Proof of the motivational link may also be established by proof of animus. E.g., *Robert F. Kennedy Medical Center*, 332 NLRB 1536 (2000). If the General Counsel satisfies his initial burden under *Wright Line*, the burden then shifts to the employer, in the nature of an affirmative defense, to demonstrate that the same action would have taken place even in the absence of the protected conduct.

1. Nathan Adams, Ralph Davis, and Nathan Robbins engaged in protected activity

Respondent admits that adverse employment actions occurred when it terminated Nathan Adams, Ralph Davis, and Nathan Robbins. However, it disputes that Adams, Davis, and/or Robbins were engaged in protected activity. Davis testified that in June he became interested in the Union and sought additional information. Thereafter, he spoke to employees daily at work, during lunch, and on break about the union. In June, Hunley witnessed Davis talking to employees about the union and Hunley engaged in the conversation. Thereafter, Davis said he

continued to discuss the union with employees until his termination in October. Notably, Davis referred employees to Kurek if they had questions about the union. Davis also gave Adams Kurek's number and Adams contacted him prior to working for Respondent again.

Adam's was reemployed in July by Respondent he spoke to employees daily about the union. In late-August or September while he was engaged a group discussion about union wages with employees, Hunley witnessed and self-injected himself in the conversation again. Adams testified that he continued to talk to employees about the union until he was terminated in October.

When Robbins was hired on October 9, Davis also talked to him about the union. Robbins immediately began to talk to employees about the union. One day he even talked to a group of employee with Hunley present. On October 18, Davis, Adams, and Robbins attended a meeting with Kurek and signed union authorization and contact cards and committed to getting other employees to sign cards. Shortly thereafter, Davis, Adams, and Robbins began to solicit employees to sign authorization cards. The evidence demonstrates that Adams, Davis, and Robbins were engaged in protected union activity.

2. Respondent had knowledge of and hostility toward Adams, Davis, and Robbins protected activity

The evidence establishes that Adams, Davis, and Robbins were engaged in protected activity and the evidence also supports a finding that Respondent had knowledge of their protected activity. As mentioned previously, Respondent had direct knowledge of their protected activity because some of it was observed by Hunley and Andres. Both saw employees in the parking lot and speaking to Union representatives, and Hunley engaged in conversation with Adams, Davis, and Robbins pertaining to union related matters.

Notwithstanding this, there is also strong supporting circumstantial evidence of knowledge that exists in this case. The evidence supports a finding that an employee was sharing information about employees' union activity with Respondent. At least one employee, Dustin told Respondent about the union activity and appeared to be an instigator immediately before Davis and Robbins were terminated. In July, Dustin told Andres about employees were talking to the Union at the gas station. Then on October 26, Dustin asked Robbins if he passed a welding test at the Union. When Robbins asked if he was interested in the union, he replied no. Additional circumstantial evidence of Respondent's knowledge pivots around the unhindered access that Hunley has to employees. Hunley, the fitters, and welders work the same hours. When Hunley's hours fluctuate because of the workload, the fitters and welders hours fluctuate. (TR110, 495). Hunley spends 95% of the time on the shop floor with the employees. When he was not on the floor, he was in his office that sat 15 feet in the air like a bird's perch that had a view of the shop floor. (TR109, 288) Hunley was always watching the employees and had ample opportunity to witness there protected union activity. Also the timing of each termination is suspect. Adams was terminated on October 20, two days after he signed an authorization card and within a day of soliciting employees to sign authorization cards. Davis and Robbins was terminated within a week after Adams although the evidence demonstrates that the plan to terminate them was also on October 20, the day they started soliciting employees to sign authorization cards. This coincidence supports an inference that the Respondent knew of the Union's organizing efforts and their involvement in, or sympathies for, the Union.

Second, the employer's general knowledge of the union's campaign is at least a factor from which the more specific knowledge regarding Adams, Davis, and Robbins in the *Wright Line* analysis may be inferred. *Montgomery Ward & Co., supra*. The Respondent certainly

knew that the Union was engaging in a campaign to organize its fitters and welders. In June and July, Andres and Hunley saw Kurek and the other union organizers talking to its employees in the parking lot on several occasions. Respondent admits it saw the union flyers in the workplace. It produced the flyers pursuant to a subpoena; thus it possessed a copy of the flyers. Respondent also spoke to union organizers and its employees about the union. Andres testified that an employee even came and told him what occurred outside the workplace involving the union campaign. Then in September the union stepped the organizing campaign up by sending two overt union organizers to apply for jobs at the Pekin, IN facility, which further put Respondent on notice about the organizing campaign.

Knowledge may also be inferred based on the small plant doctrine. In *La Gloria Oil and Gas Co.*, 337 NLRB No. 177 (2002), the Board found that one employee informed the employer that employees had a meeting with a union representative, and that they had decided to “go union”; and thus based on the small plant doctrine it inferred that the employer was aware of the identity of the employees involved in the union activity. In the present case, there are only 20 employees in the fabrication shop. The evidence revealed that one of those employees informed Respondent about the union speaking to employees at the gas station. There is also evidence that Hunley and Andres was present in the parking lot while employees were receiving union flyers and talking to the Union. Moreover, the evidence demonstrates that Adams’, Davis’, and Robbins’ protected activities of speaking to employees took place largely at work in the fabrication shop. The mere fact that they did not want management to know that they were getting authorization cards signed does not alter the openness of their sympathies with and interest in the Union. Just because some union activities were hidden doesn’t mean that all union activities were hidden. To the contrary, Adams, Davis, and Robbins openly spoke about the

union in the presence of Hunley. The evidence shows that at least some union activities were done openly and in the presence of management. Based on the small plant doctrine an inference should be drawn that Respondent had knowledge of Adams, Davis, and Robbins protected activities.

Third, the instant 8(a)(1) violations illuminate the employer's animus and thus demonstrate the employer's knowledge. Animus may be demonstrated solely by the commission of Section 8(a)(1) violations. *Greyston Bakery*, 327 NLRB 433 (1999) As previously noted, the evidence clearly establishes Respondent harbored hostility against the union which was displayed by its threatening employees with plant closure; informing job applicants that it did not hire union applicants; and interrogating a job applicant about his union membership. This evidence of protected activity by the alleged discriminates, Respondent's knowledge of that activity toward it as well as the timing of the discharge establishes a prima facie case of unlawful discrimination and the burden now shifts to Respondent to prove that it would have discharged Adams, Davis, and Robbins even absent their protected activities.

3. Respondent terminated Adams because of his support of the union;
Respondent stated reason was pretextual

Andres stated that he made the decision to terminate Adams based on information provided to him by Hunley pertaining to Adams' alleged poor attendance and poor performance. However, Respondent's termination of Adams for attendance issues is pretextual. The evidence revealed that Adams notified Respondent at the beginning of his reemployment that it would be difficult for him to get to work for a start time of 6:00 am. Hunley informed Adams that he would work five 10 hour days, 50 hours a week; but when he passed the weld test, Hunley said the start time was 6:00 a.m. Adams told Hunley that he couldn't do the 6:00 a.m. start time. Hunley replied "Do the best you can." (TR182) Adams usually arrived between 6:10 a.m. and

6:30 a.m. Adams stated that Hunley informed him to get to work when he could. Hunley testified that Adams told him he that he arrived later because he had a significant drive to work. (TR579) Hunley did not testify that Adams reason was insufficient. Adams was never issued any disciplinary action for reporting to work late. No weight should be given to testimony pertaining to actual start time or ending time because the actual attendance records were destroyed. (TR368) Since the record is void of any original time card records for Adams⁶ and Hunley did not refute he informed Adams that Adams could get to work when he could, the record does not establish that Adams had a tardiness issue. Notably, Respondent never disputed the flexibility in Adams' start time.

Respondent has a set of rules for attendance. It states, in part,

All employees are expected to report to work as scheduled and to work as scheduled and to work their scheduled hours and required overtime. Employees will be charged with an absence when they fail to report for their scheduled work hours. Absences of several days duration will be treated as one occurrence....Employees will be considered tardy when they report to work more than 6 minutes past their starting time, leave early, or extend an authorized break.

The policy states in the event of a prolonged illness, a statement from your doctor must be submitted. Progressive discipline is used for no call/no shows and tardiness. (GC9) The progressive disciplinary steps are verbal counseling, written reprimand, unpaid suspension (ranging from 1 day to 2 weeks), and termination. The policy states that before discipline is issued, an employee will always be given an opportunity to provide an explanation or justification. (GC8)

Adams was never given any verbal warnings and/or counseled about absenteeism, tardiness, and/or leaving early. (TR 183, 184, 197-198) Andres stated Adams had never been issued written discipline for absenteeism, tardiness, and/or leaving early. (TR142-143) Hunley

⁶ These documents were requested via subpoena and not produced; so Your Honor should make an adverse finding against Respondent.

corroborated that Adams had not been disciplined for attendance issues prior to his discharge. (TR592-592).

Respondent contends that it had issues with Adams leaving early. There is evidence in the record that Adams left early and this may have been to assist his father, who he stated was ill, and a friend. (TR579)(Rx 17) However, Andres testified that employees could leave early if work was complete. No evidence was presented to differentiate whether Adams' departures from work were because he completed the work early. In regards to Respondent's Rx 17, it is unknown whether the hours lost take into account times when Adam's left early because he completed work assignments or if it was for personal reasons. Thus, the evidence only shows that Adams left early but the record does not reveal whether it was excused so the numbers are not reliable. Adams was never told his reasons for leaving work early were unacceptable. Notably, Adams was never issued any disciplinary action for leaving work early.

In regards to absenteeism, Adams testified that he missed work due to doctor appointments. Adams informed Hunley of the appointments and attempted to give him doctor notes but he refused to accept them. Hunley testified that Adams told him about his doctor appointments and medical issues; however, Hunley never explained to Adams why he didn't accept the doctor notes. Hunley testified that Adams also told him that he doctors' appointments. (TR578) Adams stated he was absent some days due to health reasons. He stated that it was the first time he had insurance in a long time so he made doctors' appointments. Adams brought doctors' notes to Hunley and he just looked at them. (TR183) Adams asked Hunley if he wanted the doctors' notes; but, Hunley replied no. (TR183). Adams was never disciplined for excessive absences.

Respondent contends that Adams would have lost a certain amount of hours due to absences according to Respondent's Rx 17; however, the record evidence reveals that the fabrication shop employees' hours fluctuate. Hunley, welders, and fitters worked from 6:00 am to 4:30 am but it varies depending on workload. (TR110, 495) Their hours vary with Hunley. (TR110) There was no testimony to substantiate that Adams would have actually worked the total number of hours claimed by Respondent in Rx 17. Respondent had Hunley available to testify regarding the fabrication shop hours but did not avail itself his testimony on this subject. The exhibit is based on speculation and is thus not reliable. Irrespective, Adams was never issued any disciplinary action pertaining to absenteeism issues.

- a. Respondent's termination of Adams for work performance issues is pretextual

Respondent states, in its employee handbook, that it utilizes progressive discipline for "continued poor performance". (GC8) It states that penalties would become increasingly severe each time an offense was repeated or a performance improvement not shown, with the exception of certain intolerable offenses. Respondent claims that it conducts a visual inspection of the work product during checkout to check the length, dimension, and material composition based on the isometric drawing. (TR330, 571) If required, the product goes through an x-ray inspection according to the American Society of Mechanical Engineers. (TR329) Hartford Quality Assurance, a third party, conducts the inspection in the vault then products a report on the weld. (TR 330-332) For the inspection reports, the customer gets a copy of it. Notably, the inspector rarely reports to Respondent whether someone's x-ray failed. (TR477) Respondent only sees the inspection reports when requested. (TR477) Respondent would only ask for the radiograph inspection report when the customer had an inspector on-site. When Respondent

requests a report from Hartford Quality Assurance, Respondent gives it directly to the customer-inspector. (TR478) Respondent would visually look at the report and then pass it on. (TR479, 480) Respondent does not do anything else with the report. (TR480)

Regarding the alleged performance issues, the evidence revealed that Adams had received verbal counseling on some visual inspections; however, Respondent did not contend that the visual inspections were an issue. Hunley claimed that Adams was slower than other welders and had a high rejection rate. Notably, Hunley did not track inches; thus, he did not have an objective way to measure production. This subjective evaluation, in light of Hunley's thought that Adams was "affecting the shop atmosphere", should not be given any weight due the underlying bias against Adams because he engaged in union activities. Rather, the facts support that Adams was a highly skilled employee based on Adams pedigree and wage pay. Respondent rehired Adams at a rate of \$24/hour, which is at the upper end of the pay scale. (TR174) The range of pay for the welder is from \$19 to \$27 per hour. The starting pay depended on passing a set of three tests and their experience at time of hire. Adams passed Respondent's TIG test the first time but it took him a couple of times to pass the semi-automatic test, which is not uncommon for welders. (TR360, 474) Adams had been welding for 20 years. He has worked for the Department of Defense, the Navy, and power plants in the area. Adams attended Tulsa Welding School and graduated at the top of his class. (TR175)

Moreover, Adams was never informed that he worked slower than others or that he had a high rejection rate. Respondent had no knowledge of rejection rate until it produced the exhibits in preparation for the trial. Notably, the record established that Respondent doesn't even maintain radiographic inspection reports or does Respondent do anything with them other than pass them on to customers. Notably, the inspection reports are needed to compute the rejection

rate. The point is clear that Respondent only obtained the reports to produce summaries for litigation.

Hunley contends that it in September for a significant period of time he assigned employee Mull to help Adams with his technique; however, Respondent simply contrived assigning Mull to Adams. (TR581) Adams, in contrast to Hunley's testimony, stated that Mull was not assigned to work with him. (TR195). Adams said that one day he asked Mull to come over to show him his technique on a non-critical weld. Mull was there for about 10 minutes (TR195, 196) Adams stated that Respondent never made him aware of a rejection rate. (TR197) Hunley's testimony is not reliable because he stated Mull was assigned to work with Adams for a five- to six- day period in early September. This is impossible because Mull was no longer employed by Respondent during that time period. (TR361, 594) Also noteworthy, Respondent did not present any evidence that it evaluated employees' work performance based on rejection rates.

The evidence revealed that from the following dates Adams failed nine X-ray inspections that were conducted on components at 100%: two welds on July 27; two re-welds on July 27; one weld July 31; one weld August 18; one weld August 25; one weld August 26; and one weld August 28. Based on the record evidence, it is expected that welders with components inspected at 100% will have more rejected welds than welders with components inspected at a smaller percentage. Nevertheless, it is noteworthy that all of Adams rejected welds occurred within one month of his reemployment and nearly two months prior to his termination. There is no evidence that Respondent attempted to address any of these alleged work-related issues at that time; Rather, Respondent waited over two months after Adams last rejected weld to terminate him for, in part allegedly, poor performance.

b. Respondent never followed its progressive disciplinary policy

Hunley contends Adams was slower on semi-automatic welds and had more repairs than the other welders although the record evidence established that Hunley did not track inches to measure performance and did use the x-ray inspections (TR575, 576). Adams was never given any discipline about his work performance, except for a couple of verbal warnings for visual inspections of semi-automatic welds. (TR184, TR188) Adams never received any written discipline related to visual inspection of the semi-automatic welds. (TR189) Adams never received any disciplinary action for failing x-ray inspections and/or for taking too long to complete assignments. (TR158, 184) He was never told or counseled by Hunley that he was too slow. Adams never thought he worked slower than other workers. (TR197)

c. Respondent did not terminated similarly situated employees

Notably in addressing the unfair labor charge, Respondent provided copies of nine (9) radiographic reports dated July 27 (two welds), July 27 (two re-welds), July 31 (one weld), August 18 (one weld), August 25 (one weld), August 26 (one weld), and August 28 (one weld). (TR499) These nine welds came from three packages. (TR509) However, Andres did not know how many packages Adams had worked on while employed for Respondent. (TR510) All the welds were inspected at 100%⁷. (TR500-501) All jobs at 100% RT inspection means all parts are sent for radiographic testing.⁸ (TR331) After August 28, Respondent did not present any other rejected welds. However, the record evidence established Adams only had 9 rejections from July 27 – Aug 28, roughly a one month period. Whereas, other employees, during the period of about a one month period had similar rejections: Amos Calloway (9 rejections from

⁷ When a work product is x-ray inspected, the client determines the percentage of welds inspected for a component. (TR538)

⁸ RT Inspection may be conducted at difference percentages such as 5%, 15%, 30%, or 100%. Respondent usually places its better welders on the 100% jobs.

July 5 – Aug 15) and Rick Purtlebaugh (6 rejections from May 17 – June 20). (TR511) (CP3)
These employees are still employed by Respondent as welders. (TR510-511)

- d. Respondent did not rely upon certain documents to terminate Adams; Irrespective, the documents are inaccurate and thus not reliable

Although the evidence clearly established that Respondent does not retain or act upon the radiographic inspection reports, Respondent over General Counsel's objection was allowed to enter Rx 15. Andres testified that the Summary Report of the radiographic inspection reports was compiled solely for the purpose of litigation. As well, the evidence revealed that all the calculations were made after Adams was terminated and Andres testified that they were not relied upon to terminated Adams; therefore, Rx 15 is irrelevant to this case and has no evidentiary value. Andres stated he did not rely on these reports to terminate Adams. In explaining how the data was computed, Andres admitted that the calculation did not factor in the different RT percentages. The method used to calculate the rejection percentage is flawed. Andres testified that components are x-rayed based on a percentage designated by the client which are different. The reject percentage calculation does not factor in the difference in percentage of each component. The model used by Andres the percentages constant; however, all welds should not be weighted equally. The data is therefore not reliable due to a fallacy in the methodology. Without a coefficient to factor in the RT percentage, there is a flaw in the mathematical equation; thus the numbers are meaningless.

In a similar manner, Respondent was allowed to admit Rx 16, over General Counsel objection, which purported to provide by welder stencil number the diameter-inches, weld inches, welds total, and average weld diameter for components that were issued during the period Adams was employed. (TR401) Again, Andres testified that the document was generated for

the purpose of litigation. (TR507) It did not exist as of October 20 or October 31. He didn't look at these numbers before he made the determination to discharge Adams. (TR510) Andres testified that Respondent's Rx 16 was not relied upon for the termination of Adams. It was merely produced as a comparison for litigation. This document is thus irrelevant and should not be used in this case. Andres stated that quality control employee enters the data pertaining to each component into a computer program. Then Andres can generate reports such as Rx 16. Notably, Respondent generated sub-summary reports and the summary report from the underlying documents.

Through a demonstrative example on the stand, Andres went through a component and found an error in the sub-summary report compared to the isometric drawings. (TR407-412) For instance, a sub-summary for each component was derived and when added together should produce the results for the overall summary report, Rx 16. However, since errors were found in the sub-summary reports, it means there are errors generated from the raw data entered by employees. So, since the summary report is generated from the same raw data, there will be errors in the summary report. Thus, Rx 16 is yet another document that is not reliable due to inaccuracies in the data. In conducting a spot check of the underlying documents⁹, inaccuracies were discovered (GC20) (CP4a-CP10) General Counsel has a standing objection based on relevancy and reliability.) Notably, the compilation of the data for Rx 16 is erroneous.

In a like manner, Respondent was permitted, over General Counsel's objection, to enter Rx 17 which purported to show time lost by Adams due to leaving early and absences. The record evidence establishes that Andres prepared this document just prior to trial. (TR 491). Andres testified to his general knowledge about hours worked for welders but Respondent did

⁹ A spot check of the 11 components were conducted and inaccuracies were found each. (GC 20) and (CP4A, 5A, 6A, 7, 8, 9, and 10)

not offer evidence based on specific knowledge he knew about Nathan Adams. Andres testified that the welders' hours fluctuated and thus he was not aware of the actual hours Adams would have worked on each day that he was absent. Andres also testified that employees left early when work was completed. On the underlying documents, there was a comment area with markings. Hunley made the comments on the spreadsheet. Andres was not aware if Adams left early because he completed his work or not. Hunley did not testify regarding this matter. Hunley was available to testify pertaining to this matter but did not. The time cards that contained the time in and time out for Adams were under subpoena; however, they were not produced because they had been destroyed. Respondent asserts that after Hunley noted the total time on a spreadsheet and maintained the time cards for three weeks or so, they discarded the time sheets. Respondent stated the reason it maintained the time cards were to verify information if discrepancies occurred. (TR368). Overall, when the total lost hours were computed, Andres added the numbers together without taking into the possibility of variation in work schedules. No weight should be given to the actually number of hours lost because of the method used to is subjective. There are no documents to verify time in and time out since they were destroyed. Andres didn't have full knowledge to determine each factor. Again, the actually number itself is likely inflated and erroneous.

In sum, Respondent alleges that it terminated Adams because of attendance issues and work performance. Andres testified that he made the decision to terminate Adams based solely on the information Hunley provided him. (TR139, 421) Andres stated that Hunley told him that Adams was consistently late, left early, was absent, constantly fell x-ray inspection, and took longer to complete work. (TR139) The evidence does not support the truthfulness of these statements. By mid-October 2017, Hunley testified that Adams was affecting the shop

atmosphere. (TR582). Adams was never issued a written warning for being late to work, leaving early, absenteeism, and/or poor performance (i.e., due to slow work and failing x-ray inspections) and Respondent's evidence on these issues does not stand up to close scrutiny. Respondent has a progressive disciplinary policy yet failed to use it. An unlawful motivation should thus be found and Your Honor should find that Respondent violation Section 8(a)(1) and (3) when it terminated its employee Adams.

4. Respondent terminated Ralph Davis and Dale Robbins because of the support for the union

Although Andres testified that Davis' and Robbins' refusal to take the drug test was not a factor in his decision to terminate them, it is the sole reason cited on the termination report. Notably, Andres never contended that a possible positive drug test was the reason he terminated Davis and Robbins. Even had this assertion been made, Davis and Robbins vehemently denied stating they would test positive. Clearly, the record evidence is void of a reason why Respondent terminated Davis and Robbins. However, the evidence supports a finding that Respondent terminated them because of their support for and activities on behalf of the union. Andres did not testify credibly regarding any alleged suspicious of marijuana use by Davis or Robbins. Andres created the facts about seeing Davis on October 20 in the Dollar General Store parking lot in a van where smelled marijuana when he walked by. Andres changed his testimony after the surveillance video from the store did not support his version, and he contradicted his sworn affidavit. After entering into the stipulation, Andres claimed it was October 23 instead of October 20 that he went to the Dollar General Store. (TR424, 534) Andres claims he recalled the October 23 date based on a text to and call from Brian Kruer, President of Respondent's union facility pertaining to his availability to meet (TR537) and an email to his attorney with the drug policy attached (TR 425-427)(Rx 28). The text and conversation with his cousin didn't relate to

the drug policy so it gives no credence to why it would remind him of the Dollar General Store alleged incident. These communications with Kruer do not demonstrate that he was at the Dollar General Store on October 23. Rather the contradictory testimony, clearly challenges Andres credibility and Your Honor therefore should not credit his testimony on this matter. Rather the record evidence supports a conclusion that Andres discovered that Davis and Robbins, like Adams, signed union authorizations cards on October 18 and shortly thereafter solicited employees to sign authorization cards. This prompted Andres to call his attorney to get advice about how to administer a reasonable cause drug test. Then Andres contacted the laboratory to change its profile. Andres had Respondent's profile modified at the Norton Center for Occupational Health to include the reasonable drug testing. (TR153) Andres stated it took about a week to prepare the documents. (TR165) Prior to this instant case, Respondent only had one post-accident drug test. (TR153). Prior to October 20, that facility was only set up to do post-accident drug test for Respondent. (TR154.) Respondent had to add a reasonable cause drug test to its profile in order for the facility to conduct that type of testing. (TR154-155) Once those preparations were in place, Andres prepared the refusal to take a drug test documents in case the employees wanted to refuse. (TR428)

Once Andres had the drug testing in place, he gathered the employees one-by-one, then collectively chastised them in front of all the fabrication shop employees. Andres openly confronted them about his fabricated claim of drug use. He testified that he was prepared to terminate them and he executed that plan on October 27.

5. Respondent discriminatorily enforced its Drug Test Policy

The Board has found when a nondiscriminatory drug-testing policy is discriminatorily applied to serve the illegitimate purpose of retaliating against union supporters it violates Section

(a)(1) and (3). *Eldeco, Inc.*, 321 NLRB 857 (1996); *Wayne Manufacturing Corporation*, 317 NLRB 1244 (1995). Respondent had a drug policy that was a part of the employee handbook they signed for. The policy allowed Respondent to test employees based on reasonable cause or post-accident. Although the policy stated Respondent had urine tests on site, the record evidence established that Respondent testing kits had expired. As well, the evidence established that Respondents had only had post-accident drug test and there not been any reasonable cause drug test of an employee prior to the facts of this case. In fact, the evidence reveals that Respondent didn't have a reasonable cause drug test profile in place with the laboratory. The ground for reasonable cause drug testing was not used until Respondent disparately applied the drug policy to known Union supporters. The timing of Respondent's actions, immediately after Davis and Robbins signed authorization cards and solicited other employees to sign cards, suggests its action was motivated by their Union activities. The evidence demonstrates that Andres consulted with its counsel about its drug policy, changed its protocol with its clinic to include reasonable cause drug testing, and pre-drafted suspension documents. The Andres deliberately exerted his authority to administer the drug test to Davis and Robbins. Andres was prepared for the employees to refuse so he had them sign the refusal to take the drug test documents, suspended them, and then later the same day terminated them. If Respondent had not discriminatorily applied this policy, Davis and Robbins would not have been terminated. Thus Your Honor should find that Respondent violated Section 8(a)(1) and (3) of the Act by discriminatorily applying its drug policy to its employees Davis and Robbins because they supported the union and by discharging them.

III. CONCLUSION

For the reasons stated above and on the record as a whole, the General Counsel respectfully requests a finding that Respondent violated Section 8a(1) of the Act by threatening its employees, on multiple occasions, with plant closure if they selected the Union as their collective-bargaining representative; informing job applicants that Globe Industrial LLC does not hire union applications; and interrogating job applicants about their union membership, activities, and sympathies. Furthermore, General Counsel respectfully requests a finding that Respondent violated Section 8(a)(1) and (3) of the Act by unlawfully discharging its employees Nathan Adams, Ralph Davis, and Dale Robbins and by discriminatorily requiring Davis and Robbins to take a drug test due to their involvement in and support of an organizing campaign by the Union. The Administrative Law Judge should find and recommend the Board fashion an appropriate remedy requiring Respondents to post an appropriate Notice to Employees and order such other relief as may be necessary and appropriate to effectuate the policies and purposes of the Act.

DATED at Indianapolis, Indiana this 20th day of April 2018.

Respectfully submitted,



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IV. APPENDIX

PROPOSED NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL NOT ask job applicants about their union membership or support.

WE WILL NOT inform job applicants that we do not hire union applicants.

WE WILL NOT threaten you with closure of the facility if you choose to be represented by or support the Indiana State Pipe Trades Association and U.A. Local 502, AFL-CIO, or any other union.

WE WILL NOT fire you because of your union membership or support.

WE WILL NOT require employees to take a drug test because of their support for the Union.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer Nathan Adams, Ralph Davis, and Dale Robbins immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and/or privileges previously enjoyed.

WE WILL pay Nathan Adams, Ralph Davis, and Dale Robbins for the wages and other benefits they lost because we fired them.

WE WILL compensate Nathan Adams, Ralph Davis, and Dale Robbins for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL remove from our files all references to the firing of Nathan Adams, Ralph Davis, and Dale Robbins and **WE WILL** notify them in writing that this has been done and that the firing will not be used against them in any way.

WE WILL remove from our files all references to Ralph Davis and Dale Robbins being required to take a drug test and **WE WILL** notify them in writing that this has been done and that this will not be used against them in any way.

PROPOSED CONCLUSIONS OF LAW

1. The Respondent, Globe Industries LLC, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Charging Party is a labor organization within the meaning of Section (5) of the Act.
3. At all relevant times, Houston Andres and Benjamin Hunley were 2(11) supervisors and 2(13) agents of the Act. At all relevant times, Sherry Cress was a 2(13) agent of the Act.
4. The Respondent violated Section 8(a)(1) of the Act by the following acts:
 - a. Threatening employees with plant closure if the employees selected the Charging Party as their collective-bargaining representative;
 - b. Informing job applicants that Respondent does not hire union applicants; and
 - c. Interrogating job applicants about their union membership, activities, and sympathies.
5. The Respondent violated Section 8(a)(1) and (3) of the Act by discharging its employees Nathan Adams, Ralph Davis, and Dale Robbins to discourage membership in a labor organization.
6. The Respondent violated Section 8(a)(1) and (3) of the Act by requiring its employees Ralph Davis and Dale Robbins to take a drug test to discourage membership in a labor organization.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing General Counsel's Brief to the Administrative Law Judge has been filed electronically with the Division of Judges through the Board's E-Filing System this 20th day of April 2018. Copies of the filing are being served upon the following persons by electronic mail:

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